INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Discussion	8
Conclusion	15

CITATIONS

Cases:

Brooks v. *Dewar*, 313 U. S. 354	10
Burnham Chemical Co. v. *Chapman*, 181 F. 2d 288, certiorari denied, 340 U. S. 826	4
Chotard v. *Pope*, 12 Wheat. 586	8
Clackamas County, Oregon v. *McKay*, C. A. D. C., No. 11844, decided April 30, 1954	11, 13
Houston v. *Ormes*, 252 U. S. 469	13
Lane v. *Watts*, 234 U. S. 525	13
Larson v. *Domestic & Foreign Corp.*, 337 U. S. 682	7, 11, 14
Louisiana v. *Garfield*, 211 U. S. 70	14
Mine Safety Co. v. *Forrestal*, 326 U. S. 371	13
Mining Co. v. *Consolidated Mining Co.*, 102 U. S. 167	9
Payne v. *Central Pac. Ry. Co.*, 255 U. S. 228	12
Seiden v. *Larson*, 188 F. 2d 661, certiorari denied, 341 U. S. 950	7, 11, 12
United States v. *McLaughlin*, 127 U. S. 428	9
United States v. *Midwest Oil Co.*, 236 U. S. 459	9
United States v. *Sweet*, 245 U. S. 563	9
Wilbur v. *United States*, 281 U. S. 206	13

290107—54——1

Statutes:	Page
Act of March 3, 1853, 10 Stat. 244, Section 6	9
Act of February 10, 1855, 10 Stat. 849	2, 3
Act of March 2, 1889, 25 Stat. 854, 43 U. S. C. 700	5, 9
Act of June 26, 1936, 49 Stat. 1976, Section 2	9–10
Mineral Leasing Act of February 25, 1920, 41 Stat. 437	5
R. S. 2318, enacted June 22, 1874	5
Miscellaneous:	
Executive Order 6910 of November 26, 1934, 43 C. F. R. 297.11	5, 9

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 686

WEST COAST EXPLORATION COMPANY, PETITIONER

v.

DOUGLAS MCKAY, AS SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 25) is not reported. The opinions of the court of appeals (R. 41–98) are not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered on January 26, 1954 (R. 99). The petition for a writ of certiorari was filed April 13, 1954. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the right granted by an Act of February 10, 1855, 10 Stat. 849, "to enter * * * public lands" could be exercised by entry in 1947 upon certain mineral lands of the United States in California.

2. Whether a suit against the Secretary of the Interior which seeks to compel a conveyance, under the Act of February 10, 1855, of mineral property admittedly owned by and in possession of the United States is a suit against the United States over which, in the absence of Congressional consent, the courts have no jurisdiction.

STATUTE INVOLVED

The Act of February 10, 1855, 10 Stat. 849, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That Reese A. P. Gerard, William Gerard, and Rachel Blue (formerly Rachel Gerard,) the only children and heirs of Joseph Gerard, a messenger of the United States to the Indians, who was killed in seventeen hundred and ninety-two, be, and they or their heirs are hereby permitted to enter, each one of them severally, or his or their heirs, one section of the public lands, without the payment of any consideration for said three sections, being in full payment for the patriotic services of said Joseph

Gerard, and in accordance with the spirit of the inducements authorized by President Washington to be held out to such persons as would consent to carry a message to Fort Washington, now Cincinnati, in seventeen hundred and ninety-two, to the hostile Indians of the then Northwest Territory.

STATEMENT

This is an action in the nature of mandamus to compel the Secretary of the Interior to issue to petitioner a patent to a ten-acre tract of land in California known as the "Little Placer" claim (R. 11).

The case was submitted to the trial court on the pleadings and on a stipulation of facts (R. 10–14). The facts may be summarized as follows: Petitioner's claim is based upon the attempted entry of Little Placer in 1947. By the Act of February 10, 1855, 10 Stat. 849 (pp. 2–3, *supra*), it was provided that the three heirs of one Joseph Gerard "are hereby permitted to enter, each one of them severally, * * * one section of the public lands, without the payment of any consideration * * *." Pursuant to this statute, three certificates were issued, numbered serially from 1 to 3, each authorizing the holder to enter one section of the public lands without payment (Fdg. 4, R. 35). Of these, Certificate No. 2 was exchanged by William Gerard in 1880 for 16 special certificates or subdivisions, each authoriz-

ing the entry of one-sixteenth of a section (40 acres) of the public lands without payment. They were numbered 1 to 16, and petitioner is now the owner of Subdivision No. 6 (Fdgs. 6 and 7, R. 35). On March 14, 1947, petitioner applied for a patent on the ten acres constituting the Little Placer and delivered its scrip certificate for *pro tanto* cancellation (Fdg. 8, R. 36). The tract in suit contains valuable deposits of sodium borates in forms known as "Kernite" and "Tincal," and also valuable deposits of calcium borates known as "Colemanite," and was known, prior to June 30, 1928, to contain sodium deposits (Stip., R. 11, Fdg. 9, R. 36).[1]

By decision of June 2, 1947, the Bureau of Land Management rejected the application on several grounds (R. 15–17). On appeal, the Secretary of the Interior sustained the rejection by his decision of November 18, 1947 (R. 17–22).

Petitioner thereupon brought this action seeking to overturn the ruling of the Secretary and to compel issuance of a patent. The trial court, after finding the facts as recited, concluded (R.

[1] The valuable character of the property is also reflected by the fact that it has been for many years the subject of claims before the Department of the Interior and the courts, among which were claims of the United States Borax Company (Stip., par. 6, R. 11) and Burnham Chemical Company under the mining laws. The latter claim was the subject of the decision of the court below in *Burnham Chemical Co.* v. *Chapman*, 181 F. 2d 288 (C. A. D. C.), certiorari denied, 340 U. S. 826.

37) that Gerard scrip can be used to acquire only lands which are open to private entry; that Little Placer was not open to private entry in 1947 because (a) it was known to be valuable for minerals and mineral lands in California have never been opened by law to such entry; (b) all lands of the United States except those in Missouri were withdrawn from private entry by the Act of March 2, 1889, 25 Stat. 854, 43 U. S. C. 700; (c) R. S. 2318, enacted June 22, 1874, reserved from sale all lands valuable for minerals, except as otherwise expressly directed by law, and there is no statute authorizing the sale of Little Placer for scrip; (d) the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, permits the disposition of deposits of sodium in lands owned by the United States only by lease; and (e) Little Placer was withdrawn, reserved, and appropriated by Executive Order 6910, dated November 26, 1934, 43 C. F. R. 297.11. Pursuant to its findings and conclusions, the trial court entered its judgment of dismissal (R. 38).

Appeal was taken from this judgment by petitioner (R. 39). During argument in the court of appeals on February 27, 1952, the court raised the question whether this was a suit against the United States to which Congressional consent had not been given, and counsel for the Government agreed that it was. On September 30, 1952, the court of appeals entered an order calling for reargument before the full bench, and indicating

that the court was primarily interested in the jurisdictional question (R. 40). The case was reargued and submitted on October 30, 1952. On January 26, 1954, the court entered judgment remanding the cause to the district court with directions to dismiss for lack of jurisdiction (R. 99).

Four separate opinions were filed. The opinion of Chief Judge Stephens (in which Judges Clark, Milier, Prettyman, and Bazelon concurred) (R. 42–92) took the position that the complaint "in effect" asserted that the Secretary of the Interior was acting beyond or in want of statutory power, and that in such cases the question whether or not this is a suit against the United States could be decided only by determining the validity of petitioner's claim for a patent to Little Placer. Thus, the opinion proceeded to determine whether the district court "correctly decided * * * that the Secretary, in rejecting the application * * *, was acting pursuant to law and not, as is asserted in the petition of West Coast, beyond or in want of statutory authority" (R. 66). The opinion concluded that in disapproving the selection and rejecting the application for a patent the Secretary "was acting according to law" (R. 88). However, rather than affirming the judgment of the district court (R. 38), it remanded the case with directions to dismiss for lack of jurisdiction (R. 99).

Judges Prettyman and Bazelon, who participated in the majority opinion, filed an additional opinion stating the basis upon which they reached the same result as the majority but "by a somewhat different route" (R. 93). This opinion, after examining the Gerard Act and the applicable authorities, concluded that "it clearly appears that the Secretary had no ministerial duty to execute a patent to this piece of land" (R. 96) and therefore the United States was an indispensable party (R. 97).

Judges Washington and Edgerton, concurring in the result, saw "no occasion to consider the merits, even to the extent normally required in a mandamus action. *Goldberg* v. *Daniels*, 231 U. S. 218 at 222 (1913)" (R. 38). They reasoned that the complaint disclosed that the suit seeks to obtain possession of and title to "unquestionably sovereign property." They relied on this Court's decision in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, the decision of the court below in *Seiden* v. *Larson*, 188 F. 2d 661, certiorari denied, 341 U. S. 950, and other decisions by the court below. Judge Fahy (R. 98) stated that "Plainly, it seems to me, the suit in reality is one against the United States" and saw no reason to overrule the decision in *Seiden* v. *Larson, supra.*

Thus, although all members of the court below found this to be a suit against the United States, the eight participating judges reached this con-

clusion by what appear to be three separate routes.

DISCUSSION

1. All of the five judges of the court below who passed upon the question, as well as the district judge, agree that petitioner is not entitled by the Gerard Act to obtain a patent to the Little Placer. This conclusion is, we submit, plainly correct and would not, by itself, warrant review by this Court.

There are three independent reasons why the right conferred by the Gerard Act could not be exercised in 1947 to acquire Little Placer. First, under the decision in *Chotard* v. *Pope,* 12 Wheat. 586, petitioner had a right under the Gerard Act to enter only such lands as were open to private entry, i. e., lands first offered at public sale. The land in suit was admittedly never in that status. As petitioner all but concedes (Pet. 13–14), the *Chotard* decision cannot be distinguished. And petitioner agrees (Pet. 14) that the court below construed the word "enter" in the Gerard Act in the same way as that word was construed in the *Chotard* case.

There is no merit in petitioner's contention (Pet. 10–11, 13–15), based upon alleged legislative history of the Gerard Act and other considerations, that the *Chotard* case should at this late date be reexamined and overruled or modified. The detailed answers to petitioner's arguments in this regard may be found in the majority opinion below at pages 78–81 of the record.

Second, Little Placer is mineral land in California. Congress from the outset, and prior to the Gerard Act, froze such lands in California from all forms of disposition pending the enactment of special laws dealing with them. Act of March 3, 1853, 10 Stat. 244, section 6. And just as a true grant of sections 16 and 36 to the State of California did not vest any rights in those sections, if mineral in character, so the mere "float"[1] embraced in the Gerard Act gave no right to enter mineral lands in California. *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167; *United States* v. *Sweet*, 245 U. S. 563. Petitioner's assertion (Pet. 13) that a general policy of reserving minerals was not adopted until 1866 utterly fails to controvert the decisive fact that such a policy existed as to California at the time the Gerard Act was passed in 1855.

The third independent bar to petitioner's contentions is the Act of March 2, 1889, 25 Stat. 854, 43 U. S. C. 700, by which Congress withdrew from private entry all lands of the United States except those in Missouri, and Executive Order 6910 of November 26, 1934, 43 C. F. R. 297.11, which withdrew from all forms of entry the public lands in California and other western States. The Executive Order was plainly valid. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. Moreover, it was ratified by Congress. Act of June 26,

[1] That is to say, a grant of a certain quantity of land to be located within a larger tract of territory. *United States* v. *McLaughlin*, 127 U. S. 428, 455.

1936, 49 Stat. 1976, section 2. The answer to petitioner's attempt (Pet. 18–19) to avoid the effect of these withdrawals by asserting that they would constitute a taking of property without due process of law is that the Gerard Act was not intended, nor did it purport, to prohibit subsequent withdrawals. The fact that the lands available to satisfy Gerard scrip have diminished over the years results, as Judge Prettyman pointed out (R. 96), because the Gerard heirs and their successors in interest "stood by and watched the lands to which their right of entry would have applied dwindle away."

2. Since the issues upon the merits of this case do not present any question warranting review by this Court, there would ordinarily be no occasion for this Court to undertake to pass upon the jurisdictional question. Cf. *Brooks* v. *Dewar*, 313 U. S. 354, 359–360. However, we submit that in the situation here presented the jurisdictional question calls for review by this Court and the petition for certiorari should therefore be granted. As we have noted, *supra*, none of the judges below expressed agreement with petitioner upon the merits of the case. It was the importance of the jurisdictional question that led to an *en banc* rehearing (R. 53–54). The result of that rehearing has been a series of widely divergent views upon the subject of sovereign immunity which needs authoritative clarification. The desirability of a definitive solution of the question is underscored by the fact that it is only

the United States District Court for the District of Columbia that can entertain suits against the Secretary of the Interior (or other cabinet officers) seeking to obtain or control the disposition of federal property. The recent decisions of the court below (R. 97) indicate the frequency with which this problem arises in the District of Columbia and, in fact, it is constantly recurring in the district court. Cf. R. 54, fn. 11; Pet. 9, fn. 11; and *Clackamas County, Oregon,* v. *McKay,* C. A. D. C., No. 11844, decided April 30, 1954.

The major conflict in the views of the court below is pointed up by the effect given to *Seiden* v. *Larson,* 188 F. 2d 661, certiorari denied, 341 U. S. 950. The court of appeals had concluded that that case constituted an attempt to sue the United States without its consent, relying upon this Court's decision in *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, and especially footnote 11 (337 U. S. at p. 691) of that opinion.[2] The majority opinion of the court below in the present case took a different view of the *Domestic & Foreign* decision and overruled the *Seiden*

[2] The cited footnote 11 in the *Domestic & Foreign* opinion reads: "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple,* 134 U. S. 22 (1890)."

decision in this regard (R. 64–65). The three judges concurring in the result (Judges Edgerton, Washington, and Fahy) adhered to the *Seiden* opinion (R. 97–98).

Briefly stated, the conflict is this. The *Seiden* view is that when a suit against an officer seeks in effect to obtain the title to property which is admittedly owned by the United States it is necessarily a suit against the United States even if the officer's action is alleged to be unconstitutional or beyond his statutory powers. The majority below concludes that, if the complaint asserts that the officer is acting without power, the court must determine the merits of that claim and "is compelled to make a preliminary decision, for jurisdictional purposes, on the ultimate question in the suit" (R. 58). The cases cited by the majority (R. 57–60) do not, we submit, support its view that the mere allegation that the government officer is acting beyond his statutory or constitutional authority presents a justiciable issue when property, admittedly owned by the United States, is concerned.

We are not to be understood as urging that the fact that the Government owns property is all-conclusive. For instance, where the Secretary of the Interior acknowledges that a claimant has complied with statutory requirements which under the statute vest him with an equitable title and a right to patent, the Secretary may, of course, be enjoined from cancelling or rejecting the claim. *Payne* v. *Central Pac. Ry. Co.*, 255

U. S. 228; *Lane* v. *Watts*, 234 U. S. 525. In such cases the Secretary is, under the statute and on the basis of his own determinations, left with nothing but a ministerial duty to perform and his refusal to act is in defiance of Congress. Under traditional and settled doctrine of the law of mandamus, a Government official may always be required to perform a ministerial duty and a mandatory action to compel him to do so is not an unconsented suit against the United States. *E. g., Houston* v. *Ormes*, 252 U. S. 469; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, 374.[4]

But the present is clearly not a case where the duty to grant petitioner a patent "is so plainly prescribed as to be free from doubt and equivalent to a positive command." *Wilbur* v. *United*

[4] If it were not for their concurrence in Chief Judge Stephens' opinion, we would read the separate opinion of Judges Prettyman and Bazelon (R. 93–97) as adopting the mandamus test, *i. e.*, is the official's duty so plain and non-debatable that it can be termed ministerial? The recent opinion of a three-judge panel of the court below (per Prettyman, J.) in *Clackamas County, Oregon* v. *McKay* (*supra*, p. 11), decided April 30, 1954, appears to view the mandamus test as controlling—although we cannot agree that it applied the test correctly.

The *Clackamas County* opinion adds to the difficulty in determining the rule being applied by the court below—the decision-on-the-merits rule embodied in Chief Judge Stephens' opinion in this case or the mandamus rule espoused by Judge Prettyman. The two tests will often lead to different results on the jurisdictional issue. The *Clackamas County* opinion also re-emphasizes that the division in the court below stems from different views as to the meaning of this Court's opinion in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682.

States, 281 U. S. 206, 218. The majority opinion below is sufficient proof that no ministerial, non-discretionary duty had been imposed on the Secretary. There is a vast and important difference between determining whether the Secretary's decision was right and determining whether there existed questions sufficiently debatable to require the Government's presence as a party. *Louisiana* v. *Garfield,* 211 U. S. 70, 77–78. The court's jurisdiction in the matter, we submit, extended only to the extent of determining whether such questions existed.

However, the ruling of Chief Judge Stephens' opinion is that whenever the court reads the complaint as alleging "in effect" (R. 50, 61) that the officer was acting beyond his authority, it will undertake to determine that question by deciding whether his decision was correct. But, as this Court pointed out in *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 695, the officer's authority is frequently not limited to deciding questions correctly. No one can deny, for instance, the authority of the Secretary of the Interior to pass upon the question, under the various relevant statutes, of the Government lands upon which petitioner's right might be exercised.

Sovereign immunity from suit means that the Government's rights cannot be passed upon in its absence. Under the view of the majority below, those rights will always be passed upon in its absence and the immunity denied if the court decides that the plaintiff is entitled to the Govern-

ment land or property in question. The immunity is thereby rendered meaningless.

CONCLUSION

Respondent submits that the ruling of the majority below on the jurisdictional question is erroneous and raises an issue which should be settled by this Court. For that reason, the Government does not oppose the granting of the writ of certiorari.[8]

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys.

MAY 1954.

[8] Although we regard the decision below on the merits as clearly correct and unworthy of review here, we do not believe that the writ of certiorari should be limited to the jurisdictional issue. It is appropriate that the merits be before this Court so that it can decide the case if it should adopt the view of the jurisdictional issue—equating it with the issue on the merits—set forth in Chief Judge Stephens' opinion. If the merits are not before the Court, the only judgment which can possibly be entered here would be one of affirmance.

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